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# RECORD, CASE NO. 13674.

## SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1892.

TERM NO., 115.

WILLIAM H. ROBERTSON, COLLECTOR OF THE PORT OF NEW YORK, PLAINTIFF IN ERROR,

vs.

GEORGE S. ATTERBURY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

**FILED OCTOBER 1, 1889.**

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ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

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1 UNITED STATES OF AMERICA, ss.

*The President of the United States to the judges of the circuit court of the United States for the southern district of New York, greeting:*

Because in the records and proceedings and also in the rendition of the judgment of a plea which is in the said circuit court before you, between George S. Atterbury, plaintiff, and William H. Robertson, defendant, a manifest error hath happened, to the great damage of the said William H. Robertson, as his complaint appears, we being willing that the error, if any hath been, should be duly corrected, and full and speedy justice done to the party aforesaid in this behalf, to command you, if judgment be therein given, that under your seal, distinctly and openly, you send the record and proceedings aforesaid with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at Washington on the second Monday of October, eighteen hundred and eighty-nine, in the said Supreme Court, to be then and there held that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done thereon to correct that error what of right and according to the laws and customs of the United States should be done.

Witness, the honorable Melville W. Fuller, Chief Justice of the said Supreme Court, the 10th day of January, in the year of our Lord one thousand eight hundred and eighty-nine.

JOHN A. SHIELDS,
*Clerk.*

The foregoing writ is hereby allowed.

E. HENRY LACOMBE.

JAN'Y 10, 1889.

2 UNITED STATES OF AMERICA,
*Southern district of New York, ss:*

I, John A. Shields, clerk of the circuit court of the United States of America for the southern district of New York, in the second circuit, by virtue of the foregoing writ of error, and in obedience thereto, do hereby certify that the following pages, numbered from three to thirty-four inclusive, contain a true and complete transcript of the records and proceedings had in said court in the case of William H. Robertson, plaintiff in error, against George S. Atterbury, defendant in error, as the same remain of record and on file in said office.

In testimony whereof I have caused the seal of the said court to be hereunto affixed at the city of New York, in the southern district of New York, in the second circuit, this twelfth day of July, in the year of our Lord one thousand eight hundred and eighty-nine, and of the Independence of the United States the one hundred and fourteenth.

[SEAL.] JOHN A. SHIELDS,
*Clerk.*

(Indorsed:) 8092. U. S. Supreme Court. William H. Robertson, plaintiff in error, against George S. Atterbury, defendant in error. Writ of error. Stephen A. Walker, attorney for plaintiff in error. Due service

of a copy of the within writ of error is hereby admitted this 11th day of Jan'y, 1889. Chas. Curel, attorney for defendant in error. U. S. circuit court. John A. Shields, clerk. Filed Jan. 11, 1889.

3 GEORGE S. ATTERBURY, PLAINTIFF, *against* WILLIAM H. ROBERTSON, DEFENDANT. } Summons No. 1.

To the above-named defendant:

You are hereby summoned to answer the complaint in this action and to serve a copy of your answer on the plaintiff's attorney within twenty days after the service of this summons, exclusive of the day of service; and in case of your failure to appear or answer judgment will be taken against you by default for the relief demanded in the complaint.

Dated Aug. 7, 1882.

STANLEY, CLARKE & SMITH,
*Plaintiff's Attorney.*

Office, No. 160 Broadway, New York City.

4 (Indorsed:) N. Y. superior court. Geo. S. Atterbury, plaintiff, against William H. Robertson, defendant. Summons. Stanley, Clarke & Smith, plaintiff's attorney, 160 Broadway, New York City.

5 N. Y. superior court.

GEORGE S. ATTERBURY *versus* WILLIAM H. ROBERTSON. } Notice of appearance and demand.

You will please take notice that I am retained by and appear as attorney for the defendant in this action, and demand service of a bill of particulars of the plaintiff's claim herein and a copy of the complaint and all papers in this action upon me, at my office in the United States court and post-office building, in the city of New York.

Yours,

STEWART L. WOODFORD,
*United States Attorney, Attorney for Defendant.*

NEW YORK, Aug. 19, 1882.
To STANLEY, CLARKE & SMITH,
*Attorney for Plaintiff.*

6 (Indorsed:) 8092. N. Y. superior court. George S. Atterbury versus William H. Robertson. Notice of appearance. Stephen A. Walker, United States attorney, attorney for defendant. To Stanley, Clarke & Smith, plaintiff's attorney. Rec'd Aug. 19, '82.

7 *The President of the United States of America, to the judges of the superior court of the city of New York, greeting:*

We, for certain reasons, being desirous that our circuit court of the United States for the southern district of New York, in the second circuit,

shall be certified of a certain cause commenced before you against William H. Robertson, defendant, by George S. Atterbury, plaintiffs, do therefore command you that the record and proceedings in the said cause you distinctly and openly send to the said circuit court, at the city of New York, on the 2 day of September, 1882, as fully and amply as the same are remaining before you, by whatever names the said parties may be called therein, together with this writ, that our said court may cause to be further done thereupon what of right ought to be done.

Witness, Hon. Melville W. Fuller, Chief Justice of the Supreme Court of the United States, the 29 day of August, in the year one thousand eight hundred and eighty-two.

[L. S.] JOSEPH M. DEUEL,
*Clerk.*

STEWART L. WOODFORD,
*United States Attorney, Attorney for Defendant.*

8 (Indorsed:) 8092. U. S. circuit court. George S. Atterbury vs. William H. Robertson. Copy certiorari. Stewart L. Woodford, U. S. attorney, attorney for defendant. Take notice that the within is a copy of a certiorari this day issued out of the circuit court of the United States for the southern district of New York. New York, Aug. 29, 1882. Yours, Stewart L. Woodford, U. S. Attorney, attorney for defendant. To Stanley Clarke & Smith, plaintiff's attorney. Rec. Aug. 29.

9 Circuit court of the United States for the southern district of New York.

GEORGE S. ATTERBURY, PLAINTIFF,
*against*
WILLIAM H. ROBERTSON, DEFENDANT. } Complaint.

Plaintiff complains:

1st. That defendant was, during the times hereinafter named, collector of customs of the United States at the port of New York.

2d. That plaintiff duly imported and entered at the port of New York, the goods described in the bill of particulars annexed.

3d. The defendant, as such collector, exacted from plaintiff as and for duties thereon, one hundred and ninety dollars.

4th. That by the laws of the United States they were free of duty, but plaintiff, in order to obtain said goods, was compelled to pay the sum of one hundred and ninety dollars in gold coin of the United States in
10 excess of the amount required by law.

5th. That plaintiff filed with said defendant due and timely protests in writing upon each entry of said goods against his decision exacting such duty, setting forth distinctly and specifically the grounds of objection thereto, and also as above stated.

6th. That plaintiff made due and timely appeals in each case to the Secretary of the Treasury, who has affirmed the decision of defendant as to certain of said entries, and as to the rest of said entries, has neglected to answer said appeals, and more than ninety days had elapsed since said unanswered appeals, when this action was commenced.

7th. That the bill of particulars hereto annexed states for each importation separately the date of entry at the custom-house, of the payment of duty in excess, of the filing of the said protests, of the appeal to the Secretary of the Treasury and of his decision thereon, together with
11 the other particulars required by law, and is made a part hereof.

8th. That said sum so exacted, as aforesaid, has never been repaid to plaintiff and is still due and owing to him.

Wherefore, plaintiff demands judgment against defendant for one hundred and ninety dollars in United States gold coin with interest on the several sums named in the bill of particulars from the several dates of payment as appear thereby, together with the costs and disbursements of this action.

STANLEY, CLARKE & SMITH,
*Attorneys for Plaintiff.*

(Endorsed:) 8092. George S. Atterbury against William H. Robertson. Complaint. Due service of a copy hereof is hereby acknowledged this 7th day of Sept., 1882. S. L. Woodford, att'y for deft.
12 Stanley, Clarke & Smith, plff's. attorneys, 160 Broadway, New York City.

*Bill of particulars.*

Name of importer (for all the importations): Geo. S. Atterbury.

| Description of goods. | Whence imported. | Name of vessel. | Date of invoice. | Date of entry at custom-house. | Amount of duty illegally exacted. | Date of payment of duties in excess. | Protest filed. | Date of appeal to Secretary of the Treasury. | Date of Secretary's decision. |
|---|---|---|---|---|---|---|---|---|---|
| | | | 1881. | 1881. | | Sept. 28, '81 | 1882. | 1882. | 1882. |
| Soap stock | Liverpool | City of Richmond | Sept. 10 | Sept. 27 | 77.40 | & May 20, '82 | Feb'y 23 | Feb'y 23 | Mc'h 30 |
| | | | | | | 1882. | 1881. | 1881. | |
| Do | do | Republic | June 22 | July 13 | 32.10 | Jan. 31 | July 29 | July 29 | Ap'l 5th |
| | | | | | | 1882. | 1882. | 1882. | |
| Do | do | City of New York | Nov. 24 | Dec. 12 | 80.50 | May 2 | Feb'y 23 | Feb'y 23 | No ans. rec'd. |

14 (Indorsed:) 8092. U. S. circuit court, southern district of New York. George S. Atterbury against William H. Robertson. Bill of particulars. New York, Sept. 7, 1882. To S. L. Woodford, Esquire, defendant's attorney. SIR: Please to take notice, that this action is brought to cover duties illegaliy exacted by the defendant, as collector of customs at the port of New York, and the within is the plaintiff's bill of particulars. Stanley, Clarke & Smith, plaintiff's attorneys, 160 Broadway. Received U. S. attorney's office Sept. 7, 1882.

15 United States circuit court, southern district of New York.

GEORGE S. ATTERBURY
*versus*
W. H. ROBERTSON, COLLECTOR, &c.

The answer of the defendant herein, by Stewart L. Woodford, his attorney, to the complaint of the plaintiff in the above-entitled action.

I. He admits he was, at the times in said complaint mentioned, collector of the port of New York, and in such official capacity received payment from the plaintiff, for and on account of duties due to the United States, under the laws thereof, upon certain importations of merchandise imported by said plaintiff into the port of New York from foreign countries.

II. He alleges that any and all moneys received by him from plaintiff at the times in said complaint mentioned were paid by said plaintiff
16 as a debt due by him to the United States, and not otherwise, and were received by defendant by virtue of his office as said collector, and under the direction of the Secretary of the Treasury, and for and on account of the United States, and were forthwith thereafter and before the commencement of this action or the service of any protest paid into the Treasury of the United States; and that the amount of said moneys so received from plaintiff were the amounts due from him to the United States, according to the rate of duty imposed by law upon the several articles of merchandise by him imported and assessed with the duty, and no other sums than duties regularly assessed and ascertained and liquidated according to law upon the plaintiff's import entry thereof were collected or received by defendant from the plaintiff.

III. And defendant, further answering, denies that he has at
17 this time sufficient information to form a belief as to the precise description of the merchandise contained in the several packages referred to in the said complaint, by the marks and numbers and description there given, except in so far as to state, and defendant herein answering doth aver and state, that said merchandise was not dutiable, according to the laws of the United States, at the rates specified in the complaint.

IV. And defendant, further answering, admits that plaintiff filed with defendant certain protests, but he denies that he has sufficient information to form a belief as to whether, upon the importations in question, protests and appeals were made by the plaintiff conformable to the laws of the United States, and defendant leaves plaintiff to make such proof thereof as he may be advised.

V. And as to any other allegations in said complaint contained, not hereinbefore fully answered or admitted, defendant denies the same
18 and each thereof, and leaves the plaintiff to make such proof thereof as he may be advised.

Wherefore defendant demands judgment that the complaint be dismissed with costs.

STEWART L. WOODFORD,
*United States Attorney, Attorney for Defendant.*

(Endorsed:) 8092. U. S. circuit court, southern district of New York. George S. Atterbury vs. W. H. Robertson, collector, &c. Answer. Stewart L. Woodford, United States attorney, attorney for defendant. To Stanley, Clarke & Smith, plaintiff's attorneys. Rec'd Sept. 16, '82.

19 At a stated term of the circuit court of the United States of America for the southern district of New York, in the second circuit, held at the United States court rooms in the city of New York, on Friday, the 18th day of December, in the year of our Lord one thousand eight hundred and eighty-five. Present: The Hon. Hoyt H. Wheeler, sitting as circuit judge.

GEORGE S. ATTERBURY
*vs.*
WILLIAM H. ROBERTSON. } 8092.

Now comes the plaintiff, by Charles Curie, esq., his attorney, and move the trial of this cause. Likewise comes the defendant, by Samuel B. Clarke, esq., assist. U. S. att'y, his attorney. Thereupon a jury is empanelled, and the cause proceeds to trial. After hearing the evidence of the parties and the argument of counsel, the court directs the jury to find a verdict for the plaintiff in the amount of one hundred and four dollars and seventy cents ($104.70). Thereupon the jury render a verdict whereby they find for the plaintiff in the amount of one hundred and four dollars and seventy cents ($104.70). It is ordered that a certificate of probable cause be entered herein, and that the defendant have a stay of all proceedings on said verdict for thirty days.

JOHN A. SHIELDS,
*Clerk.*

20 U. S. circuit court, southern district of New York.

GEORGE S. ATTERBURY
*vs.*
WILLIAM H. ROBERTSON. } 8092. Judgment.

This cause having been brought on for trial before the Hon. Hoyt H. Wheeler, sitting as a judge of this court, and a jury on the 18th day of December, in the year one thousand eight hundred and eighty-five, and a verdict having thereafter been found by the jury under direction of the court for the plaintiff in the sum of one hundred and four dollars and seventy cents ($104.70), and the costs having thereafter been taxed in the sum of forty-six dollars and eighty-five cents ($46.85), now, on motion of Charles Curie, esq., attorney for the plaintiff—

It is adjudged that the plaintiff, George S. Atterbury, recover of the defendant, William H. Robertson, the sum of one hundred and four dollars and seventy cents ($104.70) damages, nineteen dollars and
21 *and* seventeen cents ($19.17) interest, and forty-six dollars and eighty-five cents ($46.85) costs, making in all the sum of one hundred and seventy dollars and seventy-two cents ($170.72), and have execution therefor. Dated New York, January 7th, 1888.

Judgment signed this 7th day of January, 1889.

JOHN A. SHIELDS,
*Clerk.*

Endorsed:) 8092. U. S. circuit court, southern district of New York. George S. Atterbury *vs.* William H. Robertson. Judgment roll. Charles Curie, esq., attorney for plaintiff, 120 Broadway, N. Y. U. S. circuit court, filed Jan. 7, 1889, 3 p. m. John A. Shields, clerk.

22 The United States circuit court, southern district of New York

GEORGE S. ATTERBURY
*against*
WILLIAM H. ROBERTSON. } N. S. 8092.

*Bill of exceptions.*

And afterwards, to wit, on the 18th day of December, 1885, this case came on to be tried before the honorable Hoyt H. Wheeler, district judge of the United States for the district of Vermont, duly assigned to hold this court, and a jury empaneled and sworn to try the issues herein.

The parties appeared by their counsel, Charles Curie, esq., for the plaintiff; Samuel B. Clarke, esq., for the defendant. The plaintiff, by his counsel, having opened his case to the jury, offered evidence, which was admitted, tending to show that in the year 1881 the plaintiff imported certain merchandise into the United States at the port of New York, which was duly entered at said port; that the defendant, as collector of the port of New York, levied customs duties upon said merchandise under Schedule M of the tariff act of 1874 at ten per centum ad
23 valorem under the provision specified in Heyl, 1290, as "Grease, all not specified." The plaintiff duly protested and appealed from the decision of the defendant to the Secretary of the Treasury, claiming that said merchandise was free of duty under the provisions of the free list of the Revised Statutes, Heyl, 1758, for soap stocks, and also Heyl, 1608, for "Grease for use for soap stock only, not otherwise provided for," because said article was imported and intended for the manufacture of soap only.

The case involved two importations, to wit: one by the City of Richmond September 27, 1881, and one by the City of New York, December 13, 1881. The amount of money paid to the collector on the liquidation of the entry by the City of New York, May 20, 1882, was $80.50; and on the entry as to the City of Richmond there was paid to the collector $71.70 on September 27, 1881, and the balance of $5.70 on May 20, 1882. The protest and appeal as to the importation of the merchandise on the City of New York were signed by plaintiff's agent and made and delivered to the collector on February 23, 1882; and as to the importation of merchandise on the City of Richmond protest and appeal were made and delivered on the same date. The affirming decisions of the Secretary of the Treasury on the appeals were made March 30, 1882. This suit was commenced August 5, 1882.

The plaintiff testified that he was a soap manufacturer; that he imported this merchandise for use as soap stock only, and intending
24 to use it in the manufacture of soap; that he did in fact so use it; and that it was invoiced to him as, and he called it, soap stock; that he made nothing else with it. On cross-examination he testified that this grease came from Bradford, England; that nearly, but not all kinds, of grease are used for making soap, all kinds of animal fats and vegetable fats; that there are some greases called "soap stock;" that this importation was so invoiced to him, and to the best of his knowledge and belief the name of this merchandise in this country was soap stock; that all he

knew about it was that he bought it in England from persons who called it soap stock and sent it to him; that he had never bought or sold this article in this market; that he was not acquainted with the purchase and sale of this article in this market; that it is made by the mingljng of soap stock with grease scoured from woolen yarns; that brown grease is made by scouring wool as it is cut off the sheep, the fatty matter from the wool is scoured out, agitated in tanks with sulphuric acid, and the grease comes to the surface and they skim it off; and that is the way it is made, to the best of his knowledge and belief; that it differs from the article usually called brown grease; that brown grease is a grease scoured from the wool and afterwards, when the wool is made into yarn, in making it into yarn they grease it again, and that is recleaned and produces this grease; that the article brown grease can not he used for making soap as this can be, and that this article in question he calls soap stock.

25 On behalf of the defendant testimony was given tending to show that there were samples present representing a series of importations by this same house; that the witness did not know that any of the samples came from that identical importation, but were a part of the series of the same character, and that the sample produced was a fair sample of the article; that the article was the well-known brown grease of Bradford, England; that it is frequently imported by oil dealers and other dealers, dealers in findings in oils, tanner's oils, and oils for stuffing leather, and that it is an article well known among such dealers, and it is generally called brown grease and generally used for stuffing leather, used for softening leather and filling the pores; it is often called stuffing, brown grease or leather stuffing; that it is generally invoiced as brown grease, often simply as grease, and in a very few instances as soap stock; and that this article, samples of which were produced upon the trial, is fit for other purposes besides making soap, and that it is made from the washing of wool goods which have been greased in the process of manufacture; that it was classified as "grease, all not specified" because it was considered not exclusively fit for soap stock, but also fit for other uses; that while it might be used for soap stock, it could also be used for other purposes.

26 The testimony of Azariah I. Knight on the behalf of the defendant tended to show that he was a dealer in oils and grease, and had been for twenty-five years; that he was acquainted with brown grease manufactured in Bradford, England; that it was used generally here for stuffing leather.

Q. (Showing witness sample). Is this a sample of it?

A. It looks very much like it. This grease varies very much in color and looks; but this is the article. That the general use of the article was for stuffing leather, in the proportion of ninety-nine barrels in a hundred; it is called brown grease on the other side; it is called grease in this country; that it is slightly but not largely used for making soap. That this brown grease is made from the soap stuffs of the woolen mills; that it is made from reclaimed grease; that olive oil and Castile soap and other soaps are used on the wool, and they are washed from the wool, and they put something in to cut the grease and get it out; it turns out into a soap stuff which twenty-five or thirty years ago was run into gutters; today it is brought back and made into grease; they use the olive oil to wash the wool, Castile or some kind of soap to wash the cloth all through

Bradford, and this grease is cut from those woolens in the shape of soap stuffs in the first place, and then rendered into grease; there is a variety of this kind of grease; hardly any two men can make the same article; mainly it is used for leather purposes, and to some extent for a lubricator.

27 Evidence was given on behalf of the plaintiffs to show the amount due under the plaintiffs' claim, as follows: On the City of New York, principal, $80.50; interest, $17.28. On the City of Richmond, principal amount, $5.70; interest, $1.22. Total amount, $104.70.

At the close of the evidence the defendant's counsel moved for the direction of a verdict in favor of the defendant, on the ground that suit had not been brought within ninety days after the Secretary's decision on the plaintiffs' appeal, to wit, on March 30, 1882.

The court held as to the importation per City of New York, the payment of duties being made May 20, 1882, the suit was within time, to which ruling defendant's counsel duly excepted.

The court also held as to the importation per City of Richmond September 27, 1881, that the original payment of duties being made on September 27, 1881, to the amount of $71.70, and the balance of duties ($5.70) on May 20th, 1882, the plaintiff could not recover the amount of the first payment thereon, because as to that the suit was not brought in time, and the plaintiffs' only recovery upon the importation per City of Richmond should be limited to the $5.70 paid on May 20th, 1882, less than ninety days prior to commencement of this suit August 5, 1882. Defendant's counsel also moved for the direction of a verdict for the defendant on the ground that the proper construction of the free list, Heyl 1608, "Grease for use as soap stock only, not otherwise pro-

28 vided for," was as though it read, "Grease fit for use as soap stock only." The court construing the said provision as though it read "Grease imported for use as soap stock only," denied the motion; to which the defendant's counsel duly expected.

The court thereupon directed a verdict in favor of the plaintiff for $104.70, to which direction the defendant's counsel duly excepted. Thereupon the jury, under the direction of the court as aforesaid, returned a verdict for the plaintiff in the sum of $104.70.

And forasmuch as the exception matters and things aforesaid would not otherwise appear by the record, I have settled, allowed, and signed this bill of exceptions on the prayer of the said defendant by his counsel.

And it is ordered that the same be filed as a part of the record herein with like force and effect as if the same had been reduced to writing and signed and filed before the case was given to the jury.

Witness my hand this 27th day of March, 1886.

HOYT H. WHEELER.

(Endorsed:) N. S. 8092. U. S. circuit court, southern district of New York. George S. Atterbury, versus Wm. H. Robertson. Bill of exceptions. Stephen A. Walker, United States attorney, attorney for defendant. U. S. circuit court. Filed Mar. 29, 1886. Timothy Griffith, clerk.

29 Supreme Court of the United States.

WILLIAM H. ROBERTSON, plaintiff in error, *vs.* GEORGE S. ATTERBURY, defendant in error. } Assignment of errors.

Afterwards, to wit, on the second Monday of October in the same term before the justices of the said court, at the Capitol in Washington, come the said plaintiff in error by Stephen A. Walker, his attorney, and says that in the record and proceedings aforesaid there is manifest error in this, to wit, that by the record aforesaid it appears that the judgment aforesaid in form aforesaid given was given for the said defendant in error against the said plaintiff in error, whereas by the law of the land the said judgment ought to have been given for the said plaintiff against the said defendant.

And the said plaintiff prays that the judgment aforesaid for the error aforesaid and other errors in the record and proceedings aforesaid may be reversed, annulled, and altogether held for nothing, and that he, the said plaintiff, may be restored to all things which he has lost by occasion of said judgment, &c.

STEPHEN A. WALKER,
*U. S. Attorney, Atty. for Def'dt.*
P.

30 (Indorsed:) 8092. United States Supreme Court. William H. Robertson, plaintiff in error, *vs.* George S. Atterbury, defendant in error. Assignment of error. Stephen A. Walker, attorney for in error. U. S. circuit court. Filed Jan. 11, 1889. John A. Shields, clerk. Due service of a copy of the within assignment of error is hereby admitted this 11th day of Jan'y, 1889. Chas. Curie, attorney for defendant in error, to , attorney for in error.

31 Supreme Court of the United States.

WILLIAM H. ROBERTSON *vs.* GEORGE S. ATTERBURY. } Joinder in error. 8092.

And afterwards, to wit, on the second Monday of October, in said term, the said defendant in error, by Charles Curie, esq., his attorney, comes here into court and says that there is no error either in the record or proceedings aforesaid, or in the giving of the judgment aforesaid.

And he prays that the said Supreme Court, before the justices thereof, now here, may proceed to examine as well the record and proceedings aforesaid as the matters aforesaid above assigned for error, and that the judgment aforesaid, in form aforesaid given, may be in all things affirmed, &c.

CHARLES CURIE,
*Attorney for Defendant in Error.*

32 (Indorsed:) 8092. United States Supreme Court. William H. Robertson, plaintiff in error, vs. George S. Atterbury, defendant in error. Joinder in error. Charles Curie, esq., attorney for defendant in error. Due service of a copy of the within joinder in error is hereby admitted this 17th day of January, 1889. Stephen A. Walker. P. Attorney for plaintiff in error. To Stephen A. Walker, esq., attorney for plaintiff in error. U. S. circuit court. Filed Jan'y 17, 1889. John A. Shields, clerk.

33 UNITED STATES OF AMERICA, *88:*

*To George S. Atterbury, greeting:*

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October, eighteen hundred and eighty-nine, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the southern district of New York, wherein William H. Robertson plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment in the writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Dated Jan'y 10th, 1889.

E. HENRY LACOMBE.

Correct: Shields.

34 (Indorsed:) 8092. U. S. Supreme Court. William H. Robertson, plaintiff in error, against George S. Atterbury, defendant in error. Citation. Stephen A. Walker, attorney for plaintiff in error. Due service of a copy of the within citation is hereby admitted this 11th day of Jan'y, 1889. Chas. Curie, attorney for defendant in error. U. S. circuit court. Filed Jan. 11, 1889. John A. Shields, clerk.

(Indorsement on cover:) Supreme Court U. S. Clerk's office. Received Oct. 1, 1889. No. 115. William H. Robertson, collector of the port of New York, plaintiff in error, *vs.* George S. Atterbury. 13674. S. New York, C. C. U. S. Filed October 1st, 1889.

149 U.S. 784

Office Supreme Court U.S.
FILED.
DEC 12 1892
JAMES H. McKENNEY,
CLERK.

# SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1892.

No. 115.

WILLIAM H. ROBERTSON,

*Plaintiff in Error,*

*vs.*

GEO. S. ATTERBURY.

# BRIEF FOR DEFENDANT IN ERROR.

EDWIN B. SMITH,

*Of Counsel,*

120 BROADWAY,

New York City.

C. G. Burgoyne, Walker and Centre Sts. New York.

# SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1892.

| | |
|---|---|
| WM. H. ROBERTSON<br>vs.<br>GEO. S. ATTERBURY. | No. 115. |

## BRIEF FOR DEFT. IN ERROR.

### Statement.

Suit to recover excess of customs-duties imposed by defendant as Collector of the port of New York, upon certain merchandise imported by Mr. Atterbury in 1881.

The imposition was ten per cent *ad val.*, under Schedule M of sec. 2504 of the Revised Statutes (Heyl, §1290) putting that rate upon "Grease, all not specified." The plaintiff's protest claimed the right of free entry under the clauses of the Free List of the Rev. Stats. for "soap stocks" (Heyl, 1758) and also for "Grease, for use for soap-stock only, not otherwise provided for" (Heyl, 1608) the original plaintiff's importations being brought in for the sole purpose of employing them in the manufacture of soap. (Rec. 8.)

Mr. Atterbury, a soap-manufacturer said he not only imported this merchandise for use in his manufacture of soap, and intending so to use it, but had actually

put it to this intended use, and no part of it to any other. It was invoiced to him as 'soap-stock,' and that was what he called it. *(Id.)*

Cross-examined, he stated that this grease came from Bradford, Eng.; that nearly, but not quite, *all kinds of grease are used for making soap;* both animal and vegetable fats. Some greases are *called* 'soap-stock'; this importation was so invoiced to him; and, to the best of his knowledge and belief, *the name of this merchandise in this country was 'soap-stock,'* though he was not a purchaser of it, nor familiar with its sale, in this country, but it was so dealt in in England, where he bought it. It is made by mingling soap-stock with grease scoured from woolen *yarns*, while brown grease is made by scouring *wool as it is cut off from the sheep.* Thus the fatty matter from the wool is scoured out, agitated in tanks with sulphuric acid, and the grease floating to the surface is skimmed off. That is the way brown grease is made to the best of his knowledge. His article differs from that usually called 'brown grease'; brown grease is a grease scoured from the wool; and, afterwards (when the wool is made into yarn) in making it into yarn, they grease it again, and *that* is recleaned and produces this grease.

*'Brown grease' cannot be used for making soap, as this can be.* The article in question he calls 'soap-stock.' (Rec. 8, 9.)

For the defense, samples of importations by the plaintiff's 'house' (not known to embrace those included in the present bill of particulars) were produced and said to fairly represent the article, which was the well-known brown grease of Bradford, frequently imported and *generally* used for stuffing leather, to soften it and fill the pores. It is often called 'stuffing,' 'brown grease' or 'leather-stuffing.' It is generally invoiced as 'brown grease,' *often simply as grease*, and in a very few instances as 'soap-stock.'

The samples produced at the trial were of an article fit for other purposes than making soap.

It was made from the washing of wool *goods*, which have been greased in the process of manufacture. (Rec. 9.)

*It was classified as "grease, all not specified" because it was considered not* EXCLUSIVELY *fit for soap-stock, but also fit for other purposes.*

*While it might be used for soap-stock, it could also be used for other purposes. (Id.* fol. 25.*)*

A dealer in grease testified in defense that the brown grease of Bradford, which looked very much like defendant's samples and (though there is great variation in color and looks) was the same article, was generally, ninety-nine barrels of a hundred, used for stuffing leather. *(Id.*, fol. 26.*)*

It is called 'brown grease' on the other side; *it is called 'grease' in this country.* It is slightly, but not largely, *used for making soap. (Ib.)*

He reiterated former testimony, that the 'brown grease' came from the *wool*, and the articles employed in *scouring it (Ib.)*; that olive-oil and soap was used upon the *wool*, and Castile or other soap to wash the *cloth. (Ib.)*

*There is a great variety of this kind of grease; hardly any two men can make the same article.* (Rec. 10 top.)

Two importations were proved upon the trial; one per City of Richmond and the other by the City of New York. That by the former vessel was Sept. 27, 1881, on which day $71.70 of the whole duties assessed thereon ($77.40) were paid. The balance ($5.70) was paid May 20, 1882, and suit brought Aug. 5, 1882, (Rec. 2) the Secretary having decided plaintiff's appeal, on this entry, March 30, 1882. *(Id.* 10, fol. 27.)

As to the importation per City of New York, duties

were all paid May 20, 1882, and their recovery sought by this suit commenced Aug. 5, 1882. *(Ib.)* The U. S. Atty. claimed the action was not seasonably brought, because instituted more than ninety days after the Secretary's decision of March 20, 1882, upon plaintiff's appeals. The Court ruled that plaintiff was in season as to his payments of $5.70 (balance) and the $80.50 paid on the City of New York importation. *(Ib.)*

Defendant's counsel asked to have a verdict directed in his favor on the ground that the clause of the free list (Heyl, 1608) " Grease for use as soap-stock only " should be construed as though it read, " Grease FIT for use as soap-stock only." The Court construing the phrase to intend " Grease *imported* for use as soap-stock only," denied the motion. (Rec. 10, fols. 27, 28.)

The Court thereupon directed a verdict for the plaintiff for $104.70, the sum of the $80.50 and $5.70 with interest. *(Ib.)*

## BRIEF.

### I.

Suit was seasonable, at least to the extent it was so held by the Court.

Omitting inapplicable words, R. S., sec. 2931, provides ;—

The decision of the Secretary on such appeal shall be final and conclusive ; and such merchandise shall be liable to duty accordingly, unless suit shall be brought within ninety days *after the decision, for any duties which shall have been paid* BEFORE *the date of such decision ;* OR within ninety days *after the* PAYMENT *of duties,* paid AFTER the decision.

The sums for which we had a verdict were "paid after the decision."

Possibly, argument may confuse the statutory language; it cannot be made any clearer than it is.

Fifteen years ago, the Attorney-General thus advised the Treasury Department;—

"4. When do the ninety days within which suit may be brought commence to run?

Answer. From the day the Secretary makes his decision, *or that on which the duties are paid, whichever is last.* If the duties are paid *before* the decision, it dates from the decision; if not paid until *after* the decision, *it dates from the payment.*"

XV Atty.-Gen's. Ops. 120.

## II.

Defendant's motion for a directed verdict (Rec. 10) concedes there were no *facts* in dispute; only the question of the legal correctness of his emendation of the actual reading of the sentence of the tariff upon which (as it reads) the plaintiff bases his case.

Colligan v. Scott, 58 N. Y. 671.
Provost v. McEnroe, 102 *Id.* 650.
Robertson v. Edelhoff, 132 U. S. 626, end of Op.

Mr. Atterbury, a soap manufacturer, imported this grease for use as soap-stock; intended to, and did, use it in making soap; and in no other way. (Rec. 8 bot.)

His testimony establishes "that there are some greases called 'soap-stock;' that this importation was so invoiced to him; and, to the best of his knowledge and belief, *the name of this merchandise in this country was 'soap-stock.'*" *(Ib.)*

*Nobody denied this commercial designation to be ap-*

*plicable*, under the circumstances; all the defendant's evidence showed was that it was more generally applied to other uses, and more frequently designated by terms peculiar to those uses; *but also known*, and used, as 'soap-stock.' (Rec. 9 middle.)

That a person or thing is known by one name, as well as by another is established by proof of the use of both as a designation, without regard to the relative frequency of their employment.

State v. Dresser, 54 Me. 571.
Com. v. Gale, 11 Gray, 320.

Defendant's last witness proved that the term '*brown* grease,' which the Government sought to fix upon this article—although it was recovered from woolen *goods*, and not from the fleece—was only its foreign designation, while "*it is called 'grease' in this country;* slightly, but not largely, used for making soap." (Rec. 9 bot.)

The foreign designation was immaterial. (200 chests Tea, 9 Wheat. * 438.) Here, it was simply '*grease*'; it was either so called, or else '*soap-stock*'; and, under either designation, was upon the free list.

The adjective was only used, on account of the color, to indicate a particular *kind* of grease; not something which was not 'grease.' Even if *brown* grease, our importation was, nevertheless, "Grease, for use as soap-stock only"; and it was "not otherwise provided for," either as 'brown grease' or by any other enumeration.

## III.

The ground of the collector's action is stated upon the record.

"It was classified as 'Grease, all not specified,' because it was considered not EXCLUSIVELY fit for soap-stock, but *also* fit for other uses. *While it might be used for soap-stock*, it could *also* be used for other purposes." (Rec. 9, end of fol. 25.)

The statute was construed by the collector's counsel as though it read; "Grease *fit* for use as soap-stock only." (*Id.* 10, fol. 28.)

The Court, read the line as of this legal effect;—'grease *imported* for use as soap-stock only.' *(Ibid.)*

R. S. sec. 2505 commences;—"The *importation* of the following articles shall be exempt from duty:"—then follows the alphabetical list of such articles, including in its proper place, under such an arrangement, the one in question.

That is to say:—"The *importation* of 'Grease, for use as stoap-stock only, not otherwise provided for,' shall be exempt from duty."

Congress intended *something* by this language; to promote some object, not merely to grant, or seem to grant, capricious favor to an article or its importer.

That object must be, *ex necessitate*, the encouragement of that business in which the freely-admitted article is to be employed.

This is true of every item of "The Free List." Hides come in free for the promotion of shoe manufacture, not for the benefit of the dealer in hides, even though he incidentally profits thereby. So, from the "Acids," which head this list;—because of their usefulness "for chemical and manufacturing purposes;"—down to "Zaffer," which closes it, for the benefit of Trenton (and other) potteries and glass-works.

The free admission of 'soap-stocks' and of 'grease for use as soap-stock only,' must be to stimulate that virtue which is next to Godliness. This phrase *must* mean *any* (non-enumerated) grease *imported* for this *purpose* '*only*';—not merely such grease as is capable of subserving no other purpose;—because in the nature of the thing, *there is no such grease.*

That the grease he imported was *fit* to make soap is established by the unanswerable fact that Mr. Atterbury *did* make soap, and nothing else, of his several importations; hence, to exact duty, the customs officers *had* to contend that exemption was secured only to such grease as was *fit only* to be employed for the purpose which this actually subserved, exclusive of every other.

This is to nullify the provision; to make it grant and withhold a privilege in the same utterance; for *there is no such grease.* No witness pretends there is; and, if one could have been found to so testify, judicial cognizance and common knowledge would deny him credence.

There may be oily and fatty substances possessing a natural odor or an acquired filth, which, practically and commercially, prevents their employment in soap-making, and restricts them to some other use (Rec. 9, end of fol. 24); and, among those that may go into the soap vat, there are varying qualities, especially adapting them to the making of particular kinds of soap—as cocoa-nut-oil to marine soaps—but any grease that *can* be used to make soap is susceptible of purification as well as of use as, or to make, a lubricant, or for lighting or heating purposes, etc., etc. One cannot imagine a grease capable of becoming an ingredient of soap, which could not become a lubricator; in other words, though the abstract idea may be enunciated, the imagination refuses to picture any grease *fit* 'only' to make soap, to the exclusion of every other capability.

" Soap may, in general terms, be defined as a chemical compound, resulting from the union of fatty oils and fats with alkaline bodies." XXII. Enc. Brit. 202.
Brande, Enc. 1134 *h. t.*

' Grease ' is defined as " oily or unctuous matter of any kind," etc.

The generality of these correct definitions refutes the *exclusiveness* of the government's theory.

Any grease *specially* adapted to soap-making becomes a ' soap-stock,' and included in that class as exempt from duty, being so known commercially; and ~~that~~ the undenied evidence is that our importations were of that character. (Rec. 8 bot.)

Examination of the statutory provisions relating to those unctuous substances ordinarily used here in making soaps further develops the absolute necessity of the construction claimed by us, and adopted by the Court.

Disregarding those essential (or other) oils which are employed simply to impart their agreeable odor, we find " all animal, whale, seal and fish oils " dutied at 20%; " olive oil, not salad," 25 cents a gallon; lard, two cents and tallow one cent a pound.

" Grease, *all* not specified," ten per cent. *ad val.*"

" Soap-stocks," free.

" Grease, for use as soap-stock only," is also free, where ' not otherwise provided for.'

Of those things most commonly employed in soap-manufacture, olive-oil, fish-oil and tallow are specified; the *class* of articles specially adapted to this purpose are enumerated as ' soap-stocks ' (in the plural); while all other fats included in the comprehensive term ' grease ' are specified as non-dutiable only when for use *as* soap-stock, whether that use is its ordinary one or exceptional. If not generally known as soap-stock (which ours was) it becomes such, *pro hac vice.*

'Grease,' *eo nomine*, is only mentioned in these two clauses. Whether usually considered and called 'soap-stock' or not, our importation was certainly here known as 'grease' (Rec. 9 mid.) and was brought in to be used as soap-stock is used. To make these two clauses of the same act stand together, grease imported for such use must be excepted out of all *unspecified* grease. Specification by purpose separates it as absolutely as a designation by name. A fund or an article dedicated to a purpose is set apart from all its like. 'Grease' is absolutely the subject of the first clause, and only relatively that of the second clause—in relation to the purpose it is to subserve; which is the primary object of this provision.

The plain and natural construction of this clause (Heyl, 1608) is the true one. This only becomes the more obvious by consulting the context and other provisions. Sometimes, such comparison may show the same word to have different meanings, or an unusual meaning; but it is not so in the present instance.

When Congress has desired to determine the liability to, or rate of, duty by the *suitability* of an article to a purpose; or by its *exclusive* adaptation; or by its *general* use; it has known how to say so—and in this tariff. If it meant '*fit*,' it said so; if it meant 'exclusively' of all but one purpose, it said so; if it intended the predominant use to govern, appropriate language was employed.

For example; "wrought scrap iron," and "old copper," and "old scrap lead," and "old brass"—in each case, "*fit only* to be remanufactured."

So, "old bell metal" and "old glass" comes in free, if "*fit only* to be remanufactured."

This is all intelligible enough; but to say the old iron must be fit only to be made into a shovel, when a hoe could be as easily fabricated from it; or the old copper only fit to be made into basins, while it must

*necessarily* be equally susceptible of being made into curtain-rings; would be a provision as absurd (and no more so) as one saying that grease imported to make soap must not possess the *capability* of being converted into a lubricant!

Again; cotton manufactures, "*suitable* for the uses to which cotton bagging is applied;" "Malacca joints, cut into suitable lengths."

Lastings, cut in such a manner as to be *fit* for buttons *exclusively*. Unsized printing paper, used for books and newspapers *exclusively*. Insulators, for use *exclusively* in telegraphy. (Would they not be *capable* of insulating a lightning-rod?)

True, the word "used" *may* indicate things *generally* used for the specified purpose; as "balsams, used for medicinal purposes; fulminating powders, and all articles used for like purposes; explosive substances, used for mining; petroleum, or bituminous substances used for like purposes; articles in a crude state, used for dyeing; vegetable substances used for beds," etc., etc.;—these designate the articles used; but "*for* a use or purpose" indicates the *object*, as well as the article.

Here *the word* "ONLY" *negatives the idea of predominant use*, and refers to the *purpose*.

In many instances other than that our record presents, the use to be made of an importation determines whether it shall pay a higher or lower rate of duty, or be admitted free. "Acorn and dandelion root, and all other articles used, or *intended to be used* as coffee, or a substitute; philosophical apparatus, for the use of any *incorporated* society; for the use of the United States; books for the use of the United States" (though these things would serve the same purpose for an individual, or an *un*incorporated society); "fruit-plants, tropical and semi, for the purpose of propagation; life-boats, etc. for the use of incorporated societies" (though every ocean steamer must have them); "specimens," im-

ported for cabinets; woods, for the manufacture of paper; works of art, for presentation to public institutions; fresh fish, for immediate consumption; fish for bait," etc. etc.

Fish, fresh enough for immediate consumption, must be *capable* of being salted or pickled; fish for bait *could* be converted into a fertilizer. A poplar log is susceptible of being transformed into many things beside paper. The painting desired by a public institution might adorn a private gallery, etc., etc.

We might indefinitely multiply illustrations, to show the absurdity of the government's assumption, that, to entitle a named import to free entry, for a prescribed purpose, it must be absolutely incapable of being applied to any other; but this is unnecessary. No other instance presents any greater absurdity than that apparent in the one presented by the record—that, to avail itself of the privilege of free entry, the grease which is to be made into soap must be physically (or materially) incapable of lubricating an axle!

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